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IN THE
Supreme Court of the United States

NO. 81

OCTOBER TERM, 1961

THOMAS N. GRIGGS, Petitioner,

v.

COUNTY OF ALLEGHENY

**On Writ of Certiorari to the Supreme Court of
Pennsylvania**

BRIEF FOR RESPONDENT AND APPENDIX

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COUNTER-STATEMENT OF THE CASE

This case is before this Court on certiorari granted from a decision of the Pennsylvania Supreme Court, *Griggs v. Allegheny County*, 402 Pa. 411, 168 A. 2d 123 (1961) (R. 80), sustaining the County's exceptions to a viewers' report and directing that the viewers' report be vacated and set aside. The exceptions to the viewers' report were filed pursuant to the provisions of the Second Class County Code, Art. 23, § 2623, 16 PS § 5623.*

The background of this case is fully set forth in the case of *Gardner v. Allegheny County*, reported at 382 Pa. 88, 114 A. 2d 491 (1955), and subsequently at 393 Pa. 120, 142 A. 2d 187 (1958). Briefly summarizing, the plaintiff, together with other property owners, brought actions in equity against Allegheny County and certain airlines, alleging: 1) continuing trespasses over their properties, and 2) a taking of their respective properties. In the *Gardner* case at 382 Pa. 88, the Supreme Court sustained the County's preliminary objections to the alleged "taking of property", and continued the case with respect

* Contemporaneously with the filing of exceptions to the viewers' report, which raised questions of law, cross-appeals were filed by the plaintiff and the County under the provisions of the Second Class County Code, Art. 26, § 2624. (16 PS 5624). These appeals are still open.

Under Pennsylvania law, questions of law are properly raised by exceptions to the viewers' report, and at the same time an appeal may be taken to the Court of Common Pleas where questions of fact are at issue: *Lower Chichester Twp. v. Roberts, et al*, 308 Pa. 195, 162 Atl. 460 (1932); *Allentown's Appeal*, 121 Pa. Super. 352, 183 Atl. 360 (1936). The specific findings of fact in this case to which no exceptions were filed by either party have the effect of an agreed statement of facts upon which the legal question could be raised.

Counter-Statement of the Case.

to an injunction for trespass. Subsequently, on June 3, 1958, in the *Gardner* case at 393 Pa. 120, the Supreme Court stayed the pending equity proceedings until the plaintiffs either proceeded under eminent domain or in actions of trespass.

A few days prior to June 3, 1958, the plaintiff filed a petition for the appointment of viewers alleging that aircraft of several airlines landing upon or taking off from the northeast runway of the Greater Pittsburgh Airport descended and ascended over plaintiff's property below the safe navigable air space as fixed pursuant to acts of Congress and that by reason of said low flights the property of the plaintiff was greatly damaged and depreciated in value. The plaintiff further averred that the defendant, by reason of its power of eminent domain, had, in fact, appropriated for public use an easement or fee simple interest in the air space over the plaintiff's property. Following proceedings before the Board of Viewers, a report was filed by the Board of Viewers in which it made certain findings of fact and conclusions of law.

The findings of fact made by the Board of Viewers included the following: (R. 34; 49; 59)

"29. There is no evidence of any control exercised over any aircraft by the County of Allegheny.

"30. All flights into and out of the Greater Pittsburgh Airport are regulated by the Civil Aeronautics Administration of the United States of America.

"31. No flights of aircraft have been shown to be in violation of any regulations of the Civil Aeronautics Administration.

Counter-Statement of the Case.

"32. No flights were shown to be lower than necessary for a safe landing or a safe taking-off."

The Board of Viewers also accepted the Finding of Fact submitted by defendant that "aircraft flew over plaintiff's property at *indeterminate* altitudes." (Emphasis supplied.) (R. 34, R. 48)

The Board of Viewers in its discussion concluded that there was an act of dominion or condemnation by the County of Allegheny and further, that

"The 'taking' of the superterranean easement over the property of Griggs became effective on June 1, 1952, at 12:01 A.M., by virtue of the Resolution of the Commissioners of Allegheny County dated May 27, 1952, designating that date and hour as the time for the opening of the Greater Pittsburgh Airport for public user. Consequently, the right to damages accrued at that time." (R. 37).

The Board of Viewers awarded Griggs damages in the amount of \$12,690.00. Griggs filed exceptions to the viewers' report and he also appealed the award to the Court of Common Pleas of Allegheny County where the question of damages would be heard de novo. The County, contending that it was not liable for any damage allegedly suffered by the claimant, filed exceptions to the viewers' report setting forth therein that, based on the viewers' findings of fact, there could be no taking of Griggs' property by the County. The County also appealed the award of the Court of Common Pleas on the question of damages. The Court of Common Pleas, acting only on the exceptions and not on the appeal, and passing only on the legal questions involved, dismissed

Counter-Statement of the Case.

the County's exceptions. The Supreme Court of Pennsylvania reversed the dismissal of the County's exceptions and directed that the viewers' report be vacated and set aside.*

The Pennsylvania Supreme Court did not pass upon the question of whether the plaintiff had shown or suffered a substantial deprivation of the beneficial use and enjoyment of his property, but did determine that the record precluded any claim for such deprivation against the County of Allegheny, assuming that there had been damage to the plaintiff's property. (R. 80 et seq.).

* The difference between exceptions and appeal is set forth in the footnote on p. 1 of this brief and is also referred to in the Pennsylvania Supreme Court's opinion (R. 81).

Summary of Argument.

SUMMARY OF ARGUMENT

1. Neither approval of a master plan by the County Commissioners, nor the execution of grant agreements between the County and the Federal government, nor the opening of the airport for use, could constitute a taking of the plaintiff's property.

2. Since plaintiff has not exhausted other remedies that are available to him before the Federal Aeronautics Administration and in the State courts, the present controversy is not ripe for decision by the United States Supreme Court since it will, in effect, be passing prematurely and most probably unnecessarily on a Federal constitutional question. That is particularly true because of the availability of proceedings before the Federal Aeronautics Administration in which plaintiff could obtain relief, if warranted, because of flights of which he complains.

A. The draft and approval of the master plan in no way committed the County to any action, nor is it, under State law, an act of eminent domain, nor does it fix or determine any property rights.

B. The execution of grant agreements was not a taking of plaintiff's property. Such agreements relate only to the removal of objects which protrude into an imaginary surface at airports fixed by the federal government and are executed for the purpose of securing Federal funds. The agreements give no rights to any of the parties to the agreement or to any outsiders concerning the taking of any property. It should also be noted that there is no claim that

Summary of Argument.

these agreements have been violated, and in fact they have not been violated.

C. The opening of the airport for use did not constitute a taking of plaintiff's property. Even assuming the plaintiff's theory that under the case of *United States v. Causby*, 328 U. S. 256, (1945), there was a taking of plaintiff's property, such taking could not occur merely by the opening of the airport. If there was a taking of property, such taking could occur only after the nature, character, frequency and permanency of the flights were definitely ascertained and there was an actual substantial deprivation of the beneficial use and enjoyment of the property.

3. Flights of aircraft within the navigable air space, that is, flights that are in accordance with Federal regulations and not lower than necessary for a safe landing and take off, are declared by Federal law immune and cannot be made the basis of a claim for a taking of property by the municipal owner of an airport.

A. Flights of aircraft within the navigable air space cannot be made the basis of a claim for a taking of property, certainly not against the County. Since Congress has declared "a public right of freedom of transit" for air commerce in the navigable air space for any citizen of the United States, all flights within the navigable air space are thus declared to be immune and in any event cannot be the subject of action for the taking of property against the County.

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B. Flights of aircraft that are in accordance with the Federal regulations and are not lower than necessary for *safe* landing and takeoff are flights within the navigable air space. The navigable air space, as defined by the Civil Aeronautics Board and interpreted by that Board and by the courts, and recognized by Congress, includes all air space *necessary for safe* landing and takeoff, regardless of the altitude involved.

4. Even if it were assumed that the flights in the present case were not within the navigable air space, Allegheny County was not the efficient cause of any damage which the plaintiff may have suffered, as the Supreme Court of Pennsylvania pointed out in its decision here involved. The County of Allegheny did not operate or exercise any control over any aircraft in and out of the airport. All flights are regulated by the United States.

5. Where the highest court of the State has determined that the facts complained of do not constitute a taking or injury of plaintiff's property by the County, and the plaintiff has been afforded a forum for such determination, there has been no deprivation of due process under either the State or Federal Constitutions.

Argument.**ARGUMENT**

I. Neither the Approval of a Master Plan by the County Commissioners, Nor the Grant Agreement Between the County and Federal Government, Nor the Opening of the Airport Are Events Which Constitute a Taking of Plaintiff's Property.

A. The Master Plan

It is clear that the question of whether the adoption of a master plan by the County Commissioners is an act of eminent domain is a question of State Law. *Sauer v. City of New York*, 206 U.S. 536, 548 (1907).

Therefore, the determination by the Pennsylvania Supreme Court on that question is final. That court stated:

"In unwarrantedly awarding damages to Griggs, the viewers relied upon a finding of fact that the County, in compliance with rules and regulations of the Civil Aeronautics Authority, drafted a 'Master Plan,' showing an 'approach area' over part of Griggs' property, which plan was submitted to and approved by the Civil Aeronautics Authority. But the drafting, submission, and approval of the plan did not give the County an easement of avigation over Griggs' property, nor was any evidence offered to show that such action deprived Griggs of any use and enjoyment of his property, substantially or otherwise." (R. 85)

The Pennsylvania Supreme Court was merely recognizing that approval of a master plan by a board of

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county commissioners has no effect on any land owner. It may be abandoned or modified by the commissioners, or it may be subsequently disapproved or modified by the Federal authorities. The master plan is simply a proposal which must be subsequently implemented in order to have any effect.

B. The Grant Agreement

Project application No. 9-36-029-801 (referred to as the grant agreement), dated June 7, 1948, between the County of Allegheny and the United States is one of many similar agreements entered into between the County and the United States and similar to agreements entered into between other airport operators and the United States.

The entire paragraph [Section 1(j), (actually 1(i)) sponsor's assurance agreement] only a portion of which was referred to by the viewers in this case, reads as follows:

"(1) Insofar as is within its power and reasonably possible, the Sponsor will prevent the use of any land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, taking-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either by the adoption and enforcement of a zoning ordinance and regulations or by the acquisition of easements or other interests in land or air-

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space, or by both such methods. With respect to land outside the boundaries of the airport, the Sponsor will also remove or cause to be removed any growth, structure, or other object thereon which would be a hazard to the landing, taking-off, or maneuvering of aircraft at the Airport, or if such removal is not feasible, will mark or light such growth, structure, or other object as an airport obstruction or cause it to be so marked or lighted. The airport approach standards to be followed in performing the covenants contained in this paragraph shall be those established by the Administrator in Office of Airports Drawing No. 672 dated September 1, 1946, unless otherwise authorized by the Administrator."

The complete agreement, together with the amendment to the Grant Agreement, is printed in the Appendix to this Brief. (p. 45 et seq.)

Grant agreements are for the purpose of securing federal aid in the construction of airports, and the sponsor's assurances in such agreements are for the purpose of having the airport operators meet the standards set up by the United States. Included in these standards is Administrator's Technical Standard Order N-18, known as TSO-N-18, which does not regulate flight, but establishes the standard for obstruction-free approaches to airports. The purpose of these assurances is to provide that objects protruding into an imaginary surface fixed by the federal government should be removed or marked. TSO-N-18 does not fix the minimum safe altitude of flight nor determine the limits of navigable air space. It does not give any indication of the altitudes of flights. It

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merely provides substantial margins for aircraft safety.¹ The provisions of TSO-N-18 are merely standards set up for the purpose of determining what obstructions the United States desires to be removed or marked.

Whatever assurances the County of Allegheny has entered into with the United States have been carried out. Many other such agreements have been entered into and are being entered into continually by the County with the United States, and there is no allegation that any claim has ever been made by the United States that the County of Allegheny has not carried out its obligations under these agreements.

The agreement between the County and the United States of America cannot give rise to any legal right in the plaintiff. On this subject, the law in Pennsylvania has been settled in *Keefer v. Lombardi*, 376 Pa. 367, 102 A.2d 418 (1954), where the Pennsylvania Supreme Court said:

"The law of Pennsylvania is clearly in accord with the Restatement, Contracts (Section 145) on this subject: 'A promisor bound to the United States or to a State or Municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation

¹The Government's brief before the United States District Court in the *Cedarhurst* case, *infra*, pointed out at page 72:

"TSO-N-18 does not authorize aircraft to fly at any altitude. All air carrier operations are conducted with large margins of safety. The lowest any aircraft would ever fly would be a substantial height above any obstruction".

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for the injurious consequences of performing or attempting to perform it, or of failing to do so, unless (a) an intention is manifested in the contract, as interpreted in the light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences *** (Emphasis supplied)."

C. The Opening of the Airport

The Board of Viewers determined that there was a taking on June 1, 1952, the day that the County opened the airport for use. Plaintiff had argued before the Board that this was the law. This is wholly inconsistent with the plaintiff's position that there was a taking because of the principles of law enunciated by your Honorable Court in the *Causby* case.

In the *Causby* case This Court determined that there was a taking because there was such repeated interference by the aircraft in that case with the enjoyment of the land owner's property as to constitute a taking.

The mere opening of an airport does not constitute such repeated use of airways over a land owner's property. It could be that the flights over a particular land owner's property would not even amount to a tort, much less a constitutional taking under the principle of the *Causby* case. It is also conceivable that although an airport were opened and although flights were planned over a particular piece of property, the airport would be so used that there may be no flights over that particular property.

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The Pennsylvania Supreme Court in the *Gardner* cases, following this Court's language in the *Causby* case, indicated that whether or not there would be a taking of property and the extent of such a taking, whether in fee or merely an easement, or whether the flights would constitute a trespass, or whether the flights would not constitute any cause of action, depended upon the nature, character, frequency and permanency of the flights.

As of the date of the opening of the airport—June 1, 1952—no flights whatsoever had occurred, so that under no circumstances could it be said that anything had occurred with respect to the plaintiff's property on such date, nor was there any way of determining by using the tests indicated by the Court what the nature and extent of the taking was. The Pennsylvania Supreme Court had said in an earlier case, *Crew v. Gallagher*, 358 Pa. 541, 548, 58 A.2d 179, (1948):

"After the establishment of a regular flight traffic pattern, if airplanes fly very close to plaintiff's buildings, or in any other way cause real damage to plaintiff's property, adequate relief in equity will be available to them" (Emphasis supplied)

The determination that the date of the opening of the airport, June 1, 1952, is the date of a taking of property by reason of flights is completely unrealistic. To show how unrealistic such a basis is, let us assume that "A" owns property near the airport. On June 1, 1952, the date of the opening of the airport, some few flights occurred over "A's" property or, as in the instant case, no flights occurred for some period of time. "A" then sells the property to "B" in December of 1952.

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The flight pattern then develops and numerous flights occur over the property in 1953 and thereafter. If plaintiff's contention is adopted, an easement was taken from "A" on June 1, 1952, but in order to prove his damage, "A" would have to prove interference on a subsequent date with property owned not by "A" but by "B". Therefore, "A" would have a right of action, but the testimony as to damages would be determined by the effect not on "A" but on the subsequent owner. On the other hand "B", the owner of the property at the time of the physical interference takes place, would, under the plaintiff's position, have no cause of action whatsoever. Are not the decisions of this Court and the Pennsylvania Supreme Court, requiring a showing of the nature, character, frequency and permanency of the flights, based on a much more solid and reasonable foundation?

Plaintiff, in his testimony before the Board of Viewers, (R. 22 to R. 27) seems to predicate his theory of liability solely on the fact that unidentified planes flew over his property some time after June 1, 1952. For this reason, the County before the Board of Viewers did not introduce testimony inasmuch as it was apparent that the tests laid down by the Pennsylvania Supreme Court and this Court in the *Causby* case concerning the height and frequency of flights had not been met. The contention of plaintiff seems to be that the mere flight of aircraft over his property is sufficient to show liability against the County. Such a contention ignores the tests set forth in all the heretofore reported cases. No one now upholds the validity of the theory that the property owner owns from the center of the earth to the end of the sky.

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II. Since Plaintiff Has Not Exhausted Other Remedies That Are Available to Him Before the Federal Aeronautics Administration and in the State Courts, the Present Controversy Is Not Ripe for Decision by the United States Supreme Court Since It Will, in Effect, Be Passing Prematurely and Most Probably Unnecessarily on a Federal Constitution Question.

A. *This Court will not prematurely pass upon constitutional questions.*

This Court has declared on many occasions that it will avoid making premature and perhaps unnecessary determinations of constitutional questions.

In the case of *Kovacs v. Brewer*, 356 U.S. 604, (1958) this Court stated the principle as follows:

"As presented the case obviously raises difficult and important questions of constitutional law, questions which we should postpone deciding as long as a reasonable alternative exists."

To the same effect is *Communist Party of U.S. v. Subversive Activities Control Board*, 351 U.S. 115 (1956). In that case, at page 122 of 351 U.S. of the opinion, your Honorable Court said the following:

"At the threshold we are, however, confronted by a particular claim that the court of appeals erred in refusing to return the case to the Board for consideration of the new evidence proffered by petitioner's motion and affidavit. This non-constitutional issue must be met at the outset, because the case must be decided on a non-constitutional issue, if the record calls for it, without

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reaching constitutional problems. *Peters v. Hobby*, 349 U.S. 331."

To the same effect is *Benanti v. U.S.*, 355 U.S. 96 (1957), in which your Court, in a case involving evidence obtained by wire tapping by state enforcement officers, at page 199 of the opinion, stated as follows:

"Petitioner, relying on this Court's supervisory powers over the federal court system, claims that the admission of the evidence was barred by the Federal Constitution and Section 605. *We do not reach the constitutional questions as this case can be determined under statute.*"

See also *Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129; *Neese v. Southern Railroad Co.*, 350 U.S. 77; *Peters v. Hobby*, 349 U.S. 331.

On the present state of the record, it appears that plaintiff is asking this Court to do precisely what the cases cited above indicate should not be done. Plaintiff, by his insistence during the course of this litigation that there was a taking of his property and that that taking was by the County of Allegheny, has failed to pursue other remedies that are available to him both before the Federal Aviation Agency and the State courts. If plaintiff had resorted to these remedies he would not now be asking the Supreme Court of the United States for what is, in effect, a declaratory judgment on a constitutional question when it is not even clear under State law whether he has made out a case in the appropriate State tribunals.

Argument.

B. Plaintiff has a remedy available under the Federal Aviation Act.

The Civil Aeronautics Act of 1938, as amended, Act of June 23, 1938, C. 601, Title X, § 1005, 52 Stat. 1023; 49 USCA 645, provides in part as follows:

"* * * whenever the Board is of the opinion that an emergency requiring immediate action exists in respect of safety in air commerce, the Board is authorized, either upon complaint, at once, if it so orders, without answer or other form of pleading by the interested person or persons, and with or without notice, hearing, or the making or filing of a report, to make such just and reasonable orders, rules, or regulations, as may be essential in the interest of safety in air commerce to meet such emergency: PROVIDED FURTHER, That the Board shall immediately initiate proceedings relating to the matters embraced in any such order, rule, or regulation, and shall, insofar as practicable, give preference to such proceedings over all others under this chapter."

Under the provisions of the present Act of Congress, which governs this situation, Public Law 85-726, Title X, § 1002, August 23, 1958, 72 Stat. 788, 49 U.S.C.A. 1482, there is set forth a complete procedure which is presently available to the plaintiff in this case:

"(a) Any person may file with the Administrator or the Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of

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this chapter, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Administrator or the Board to investigate the matters complained of * * *

In both Acts, provision is made for appeal to the Court of Appeals and to the United States Supreme Court. Here is afforded to the plaintiff an administrative remedy which he could have pursued and which is a complete answer to his problem.

It is submitted that the plaintiff should have pursued his remedy before the Civil Aeronautics Board, whose Administrator "is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time [inter alia] * * *

"6. Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce." (Pub. L. 85-726, Title VI § 601, Aug. 23, 1958, 72 Stat. 775, 49 U.S.C.A. 1421)

In the case of *City of Newark, N. J., et al. v. Eastern Airlines, Inc., et al.*, 159 Fed. Supp. 750 (1958) which originally involved an action by three cities, two townships, six individuals and the Newark Airport Mayor's Committee, against seven airlines, the Port of New York Authority, the United States of America, and the Civil

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Aeronautics Agency, to enjoin the defendants from flying below 1200 feet from the ground, to award damages, and to compel the Port Authority and the United States to acquire by condemnation the plaintiff's property, the Court went in detail into the powers of the Civil Aeronautics Board to enact rules for minimum safe altitudes of flight, the rules actually adopted by the Civil Aeronautics Board and the effect of these rules. It cited the *Causby* case and the case of *Allegheny Airlines, Inc., et al. v. Village of Cedarhurst et al.*, 238 F. 2d 812 (1956), the latter for the proposition that the Federal regulatory system has preempted the field of safety regulation below as well as above 1,000 feet from the ground. The Court held in effect that it could not, by judicial decree, unwarrantedly interfere with the regulatory power vested in the Civil Aeronautics Board since this would result only in an unseemly conflict between the Civil Aeronautics Agency and the Court. The Court further pointed out that such a piecemeal approach, if followed by every major airport of which there were at the time 194, would completely destroy the uniformity contemplated by the Civil Aeronautics Act. The Court then directed the plaintiffs to pursue their remedy before the Civil Aeronautics Board petitioning for the issuance or amendment of the rules governing minimum safe altitudes or flight patterns. In this connection it could be pointed out that the Federal Aviation Agency has even mandated so-called anti-noise flight patterns for Los Angeles Airport and New York International Airport (*Los Angeles International Airport Traffic Pattern Area Rules*, 25 F.R. 1764 (1960); *New York International Airport Traffic Area Rules*, 25 F.R. 8538 (1960)).

Argument.

The plaintiff in this case should have pursued this administrative remedy which is reviewable by the courts and which would have made further resort to the State courts and to this Court clearly unnecessary.

C. Plaintiff has State remedies available

Besides the existence of a possible remedy before the Federal administrator, plaintiff still has, as indicated above, possible remedies under State law. His equity case is still pending before the Court of Common Pleas of Allegheny County in which injunctive relief and damages are sought against the airlines and the County. The Supreme Court of Pennsylvania, passing on Pennsylvania law, has indicated that an action in trespass might be available under State statutes. Plaintiff contends that these remedies are illusory and that he will be left with no remedy. In effect, he is asking this Court to rule on a question of Pennsylvania law contrary to what the Pennsylvania Supreme Court has already ruled. The New Jersey District Court, in the *City of Newark* case, *supra*, found that there could be a remedy in tort against the airlines in a similar situation under State law and did not consider that remedy illusory.

Plaintiff's argument is really predicated on the proposition that the County ought to be liable because other remedies may be difficult or inconvenient. Liability because of convenience is a new proposition in the law. Liability because of difficulty in proving a case against other parties (which difficulty is perhaps more imaginary than real, because of Pennsylvania's broad discovery procedures at pre-trial) is a new proposition in the law. Plaintiff has even suggested in his Petition for

Argument.

Certiorari that the difficulty in proving such cases is in itself a deprivation of due process. Certainly, this too is a novel proposition. Is not ultimately the plaintiff trying to prove a constitutional taking by the County because of the tortious conduct of others or even perhaps because of the difficulty of proving the tortious conduct of others?

It might be noted also that before your court is a record only of Viewer's proceedings which are not determinative on factual questions and which are subject to review, in the pending appeals, by a judge and jury in the Pennsylvania Common Pleas Court. If, in effect, the Pennsylvania Supreme Court has given a declaratory judgment on facts which must be reviewed *de novo* in the State courts, plaintiff is still asking this Court to render another declaratory judgment in opposition to that of the Pennsylvania Supreme Court. In view of the other remedies possible to the plaintiff which he has not yet attempted to exhaust, it is submitted that he is asking this Court to make a premature determination of issues which might be rendered unnecessary if plaintiff had resorted to proper remedies available to him in other tribunals.

Argument.

III. Flights of Aircraft Within the Navigable Air Space, That Is, Flights That Are in Accordance With Federal Regulations and Not Lower Than Necessary for a Safe Landing and Takeoff, Are Declared by Federal Law Immune and Cannot Be Made the Basis of a Claim for a Taking of Property by the Municipal Owner of an Airport.

The Pennsylvania Supreme Court in the *Gardner* case at 382 Pa. 88, at page 99, following the decision of this Court in the *Causby* case, said:

"* * * Congress, by the Civil Aeronautics Act of 1938, 52 Stat. 973, 977, 1028, §1107 (i) (3), 49 U.S.C. §176 (a), enacted: 'The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above all inland waters and the air space above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction.' This provision originated in the Air Commerce Act of 1926, 44 Stat. 568, 572, §6. The 1938 Act also declares 'a public right of freedom of transit' for air commerce in the navigable air space to exist for any citizen of the United States. 52 Stat. 980, §3, 49 U.S.C. §403."

At page 107 the Court said:

"The Acts of Congress, as above noted, appropriate for air travel the navigable air space throughout the United States and then *define navigable air space as 'air space above the minimum*

Argument.

safe altitudes of flight prescribed by the Civil Aeronautics Board (formerly Authority')."

In accordance with its powers to implement the Civil Aeronautics Act, the Civil Aeronautics Board adopted the Regulation 60.17, which has since been codified into statute by Congress. The regulation in question provides as follows:

"... The Board's Regulation 60.17 provides: 'Regulation 60.17. Minimum Safe Altitudes. *Except when necessary for take-off or landing* no person shall operate an aircraft below the following altitudes:

'(a) Anywhere. An altitude which will permit, in the event of the failure of a power unit, an emergency landing without undue hazard to persons or property on the surface;

'(b) Over congested areas. Over the congested areas of cities, towns or settlements, or over an open-air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet from the aircraft ...

'(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle, or structure ..."

The position of the County and of the Federal agencies who participated in the *Gardner* case at 382 Pa. 88, was that the navigable air space consisted of whatever

Argument.

air space was reasonably necessary for safe take-off and landing, regardless of the altitude. It is respectfully submitted that the Supreme Court specifically adopted that position when it said at page 108 of 382 Pa.:

"Regulation 60.17 defines and prescribes the air space appropriated for take-offs and landings, if at all, only negatively and by implication. However, since take-offs and landings are obviously absolutely necessary if there are to be interstate flights, or indeed if there is to be any flying at all, reason and common sense impel the conclusion that Congress must have intended the Federal Agencies to have the right and power to prescribe and appropriate for public use such air space as is *reasonably necessary* for take-offs and landings. This naturally will vary with terrain, wind conditions and other factors and consequently it is difficult and may be impractical and unwise to attempt to more particularly define such air space."

This is in complete accord with the Civil Air Regulation No. 60.17 interpretation of No. 1, adopted by the Civil Aeronautics Board on July 22, 1954, a copy of which is attached to this brief. It will be noted that on page 1 of this interpretation it is stated: (Appendix p. 60)

"* * * Directly involved is the question whether the airspace which lies at and above the flight path of aircraft making normal take-offs and landings comes within the term 'navigable airspace' as defined in the Civil Aeronautics Act. If it does, a public right of freedom of transit is recognized and proclaimed to exist for citizens of the United States by section 3 of that Act."

Argument.

And on page 4: (Appendix p. 65)

"In consideration of the foregoing, the Board construes the words 'Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes' where such words appear in § 60.17 of the Civil Air Regulations, as establishing a minimum altitude rule of specific applicability to aircraft taking off and landing. It is a rule based on the standard of necessity, and applies during every instant that the aircraft climbs after take-offs and throughout its approach to land. Since this provision does prescribe a series of minimum altitudes within the meaning of the Act, it follows, through the application of section 3, that an aircraft pursuing a normal and necessary flight path in climb after take-off or in approaching to land is operating in the navigable airspace." [Emphasis supplied]

The United States Court of Appeals for the Second Circuit, in the *Cedarhurst* case, *supra*, has adopted exactly the same position as the Pennsylvania Court in the *Gardner* case. In that case, not only did the Court interpret the regulations exactly the same way as the Pennsylvania Court did, but it also determined that the promulgation of the regulations was proper and not an invalid delegation of legislative power. In that case the Court said:

"The appellants do not dispute that the federal government has preempted the field of regulation and control of the flight of aircraft in the air space 1,000 feet or more above the ground. The dispute relates to lower reaches of air space which are necessary for take-offs from and landings at airports.

Argument.

As to this the appellants contend, in substance, (1) that Congress has not purported to preempt the air space under 1,000 feet; and (2) that the Regulations of the Civil Aeronautics Board and the Administrator, which in some circumstances require planes leaving or landing at Idlewild to pass over Cedarhurst at an elevation as low as 450 feet, are invalid.

* * * * *

The first contention is refuted by the terms of the Civil Aeronautics Act of 1938, Section 3, 49 U.S.C.A. § 403 declares

'There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States.'

Section 2, 49 U.S.C.A. § 402, directs that in exercising its powers and performing its duties under the Act, the Board shall consider as being in the public interest and in accordance with the public convenience and necessity '(e) The regulation of air commerce in such manner as to best promote its development and safety.' Section 601, 49 U.S.C.A. § 551 (a) empowers and directs the Board

'* * * to promote safety of flight in air commerce by prescribing and revising from time to time—

* * * * *

(7) Air traffic rules governing the flight of * * * aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between aircraft and between aircraft and land or water vehicles.'

Argument.

The foregoing provisions contain no suggestion that "navigable air space" is restricted to air space not less than 1,000 feet above the ground. On the contrary the Congressional purpose is clear to empower the Board to make rules as to safe altitudes of flight at any elevation since its rules were to have, among other objects, prevention of collisions between aircraft, and between aircraft and land or water vehicles. Obviously the greatest danger of such collisions is when an aircraft takes off or lands. Appellants' argument that the Board has itself established the minimum safe altitude of flight over a congested area, such as Cedarhurst, at 1,000 feet, completely disregards the express exception of take-off and landing stated in the regulation. The federal regulatory system, if valid, has preempted the field below as well as above 1,000 feet from the ground."

With respect to the contention that the promulgation of such regulations was an invalid delegation of legislative power, the Court said:

"It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. 'If Congress shall lay down by legislative act an intelligible principle * * * such legislative action is not a forbidden delegation of legislative power.' *Hampton Co. v. United States*, 276 U.S. 394, 409. Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied'.

Argument.

It would be utterly impracticable to attempt to specify by statute the precise height at which a plane could safely take off from or land at an airport, since in each instance decision must depend on many variants, such as weather conditions, character of the terrain, locations of cities and of airports, size and weight of the plane and its cargo, and other relevant factors. Such decisions can only be made by some specially equipped administrative agency which can act ad hoc to carry out the congressional policy declared by statute. Again and again delegations to such agencies have been sustained where the standards for administrative action were less precise than in the case at bar."

Thus, under the regulations of the Civil Aeronautics Board, as interpreted by the Board and as determined by the Pennsylvania Supreme Court in the *Gardner* case and by the United States Court of Appeals for the Second Circuit in the *Cedarhurst* case, a flight is within the navigable air space if reasonably necessary for a safe landing and takeoff, regardless of the altitude at which it may be made.

The Pennsylvania Supreme Court in this case says that this conclusion has the rationale of reality to support it, but seems to feel that it is precluded from adopting this position because of *United States v. Causby* and because of the fact that Congress did not enact it into statute until 1958. However, as the U.S. Court of Appeals for the Second Circuit has indicated, in the language quoted above, the regulations promulgated by the Civil Aeronautics Board were in accordance with previous delegation of powers made to the Board by Con-

Argument.

gress and, therefore, fully effective on the date the present litigation arose. This position, it is submitted, is not inconsistent with the *Causby* case which is the only decision of the United States Supreme Court on this subject. In that case your Honorable Court said:

"If any air space needed for landing or taking off were included (in the term 'navigable air space') flights which were so close to the land as to render it uninhabitable would be immune."

It is, therefore, submitted that every court that has reviewed this problem, including the United States Supreme Court, with the exception of the Supreme Court of Washington in the case of *Ackerman v. Port of Seattle*, 55 Wn (2d) 400 348 P. 2d 664 (1960), has decided that *safe flights* necessary for landing or take off are within the navigable air space and immune.

The plaintiff in this case has persistently referred to navigable air space as meaning the air space only above 500 feet. This arbitrary figure of 500 feet has never been recognized by any court as being the limit of navigable air space. On this point, the position of the plaintiff is identical with the position of the Village of Cedarhurst in the *Cedarhurst* case, in which the contention was specifically and clearly overruled. It is to be noted also that the Pennsylvania Supreme Court in the *Gardner* case, 382 Pa. 88 specifically refused to adopt this position and did not, as a matter of fact, adopt it in the present case where this question, although discussed, is not determined. Although the Pennsylvania Supreme Court thus avoided the question of the limits of navigable air space, it is submitted that that same court had already answered this question in the first *Gardner* de-

Argument.

cision, 382 Pa. 88, at page 108, when it interpreted the regulations of the Civil Aeronautics Board which were in effect at the time of the opening of the Greater Pittsburgh Airport:

"Regulation 60.17 defines and prescribes the air space appropriated for take-offs and landings, if at all, only negatively and by implication. However, since takeoffs and landings are obviously absolutely necessary if there is to be interstate flights, or indeed if there is to be any flying at all, reason and common sense impel the conclusion that Congress must have intended the Federal Agencies to have the right and power to prescribe and appropriate for public use such air space as is *reasonably necessary* for take-offs and landings. This naturally will vary with terrain, wind conditions and other factors and consequently it is difficult and may be impractical and unwise to attempt to more particularly define such air space."

To any possible objection that this interpretation of the regulations of the Civil Aeronautics Board is

¹At the time of the *Causby* case, the minimum safe altitude regulation contained the following language:

"Exclusive of taking off from or landing upon an airport or other landing area . . ."

The word "necessary" which now expresses a clear, although flexible standard of minimum altitude was introduced only subsequent to the *Causby* case, but prior to the matters involved in the instant case. This was a material change and the Civil Aeronautics Board, the Pennsylvania Supreme Court, and other courts have defined the present regulations to mean that navigable air space means any air space, regardless of altitude, necessary for landing or take-off.

Argument.

confiscatory it must be noted that implicit in any definition of the term "navigable air space" is the idea of *safe* landings and takeoffs. It is not the County's position that planes can fly in and out of the Greater Pittsburgh Airport at a height above buildings or land which would render such flights unsafe. However, in the instant case, there has been an explicit finding by the Board of Viewers, which was adopted by the Court of Common Pleas and the Supreme Court of Pennsylvania, that the flights in question are *safe* for air travel. Rule 60.17 of the Civil Aeronautics Regulations, promulgated by the Civil Aeronautics Board (14 C.F.R. 60.17), prescribes as minimum safe altitudes for takeoff and landing the lowest altitude at which it is necessary to fly in order to accomplish a safe takeoff and landing. This furnishes a standard of altitude of such flights. It is unlawful to fly lower on takeoff or landing than is necessary in the light of reasonably safe standards applied to the circumstances of the flight. Therefore, lawful takeoff and landing flights are in the navigable air space. Flights which are dangerous because they are too close to the land or too close to structures on the land would be unlawful because they would not be safe. The attention of this Court is respectfully directed again to the finding of the fact by the Board of Viewers that all the flights in the instant case were not in violation of any regulations of the Civil Aeronautics Administration nor lower than necessary for a safe landing or a safe takeoff.

Moreover, it should be noted that all this interpretation does is to legalize flights that might constitute nuisances or trespass or other forms of tortious conduct. Congress certainly possesses the power to change appli-

Argument.

cable tort law as regards the instrumentalities of Interstate Commerce.

Furthermore, if it should be argued that the regulations authorize such substantial deprivation of property that they are beyond Congress's power—and there is no such evidence in this case—then plaintiff may conceivably have a cause of action against the United States—after having first exhausted his administrative remedies before the federal regulatory agencies as pointed out above and this Court would, at that time, have before it the precise question it said it did not have before in the *Causby Case*—the constitutionality of the federal regulatory scheme. As this Court said in the *Causby* case at p. 263 of 328 U.S. 257:

"If that agency [the then CAA] prescribed 83 feet as the minimum safe altitude, then we would have presented the question of the validity of the regulation. But nothing of the sort has been done."

What the Supreme Court said was not done in the *Causby* case has now been done by CAB regulation 60.17, the interpretative regulation No. 1, the *Cedarhurst* case, the *Gardner* case at 382 Pa. 88 and the Federal Aviation Act of 1958.

Whatever the result of this constitutional question, which is not now before this Court, that question is something between the plaintiff and the United States; but in no event under the regulations promulgated by the federal regulatory agencies pursuant to Act of Congress, can it be said, let alone held, that the County has taken any property beyond the confines of the Airport.

Argument.

Reference has already been made to the case of *Ackerman v. Port of Seattle*, Supra, which is the only case holding contrary to the County's position. The Court's attention is called to the dissenting opinion in that case which states at page 673 of 348 P. 2d:

"United States v. Causby, 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206, is cited by the majority opinion, but it does not support it. I quote from the Causby case [328 U.S. at page 266, 66 S. Ct. at page 1068]:

"The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment [United States Constitution.] The airspace, apart from the immediate reaches above the land, is part of the public domain * * *

It goes on to define the public domain as the air above the minimum safe altitude of flight prescribed by the Civil Aeronautics Authority.

There are no allegations in the complaint that the flights are in violation of the rules of the Civil Aeronautics Authority. Hence, there has been no invasion of plaintiff's property or any constitutional taking of it under the rationale of the Causby case."

In connection with this entire problem, the concurring opinion of Mr. Justice Jackson in the case of *North-West Airlines, Inc., v. State of Minnesota*, 322 U. S. 292, 302-303, is very pertinent:

"Aviation has added a new dimension to travel and to our ideas. The ancient idea that landlordism and sovereignty extend from the center of the world to the periphery of the universe has been modified.

Argument.

Today the landowner no more possesses a vertical control of all the air above him than a shore owner possesses horizontal control of all the sea before him. The air is too precious as an open highway to permit it to be 'owned' to the exclusion or embarrassment of air navigation by surface landlords who could put it to little real use.

"Students of our legal evolution know how the Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. *Gibbons v. Ogden*, 9 Wheat 1, to *United States v. Appalachian Electric Power Co.*, 311 U. S. 377. Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time."

IV. Even If the Flights Should Be Considered Not Within the Navigable Air Space or Within the Navigable Air Space and Not Immune, the County of Allegheny Has Not Been the Efficient Cause of Any Damage That Might Result From the Flights.

The Board of Viewers found that there was no control exercised over any aircraft by the County of Allegheny and that all flights into and out of the Greater Pittsburgh Airport were regulated by the Civil Aeronautics Board of the United States. It is a fact that in the control of airplanes flying in and out of the Greater Pittsburgh Airport the County of Allegheny has abso-

Argument.

lutely no right or permission to even be within the confines of the Federal aviation authority facilities at the airport.

As the concurring opinion in the *Northwest Airlines* case, *supra*, has stated:

"Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to Federal Government alone and not to any state government."

The position of the County in the present case differs radically from that of the United States government in the *Causby* case. In *Causby*, the planes were owned by the United States, they were flown by personnel of the United States and were flown under regulation promulgated by the United States. In the present case, the County does not own the planes, does not supply the personnel to man the planes, and does not promulgate any regulations. While this Court in holding the United State of America liable in the *Causby* case, did not explicitly relieve the owner of the airport from liability, such a finding is implicit in this Court's decision.)

Argument.

The position of the Greensboro High Point Authority, which operated the airport in *Causby*, was exactly the same as the position of the County of Allegheny in this case. A review of the transcript or record in that case indicates that the Greensboro High Point Authority was the operator of the airport in that case just as the County of Allegheny is the operator in the present case. On page 218 of the transcript of record submitted to the Supreme Court in the *Causby* case, there is printed in full the lease between the Greensboro High Point Airport Authority and the United States of America. Paragraph 2 of the lease (page 218 of the transcript) states:

"It is understood and agreed that the exclusive and unrestricted use of same by the government shall be executed concurrently, jointly and in common with the Lessor and its tenants."

This provision is also set forth in the decision of the Court of Claims, *Thomas Lee Causby and wife, Tenie Causby v. The United States*, 104 Court of Claims Report 342, 345 (1945).

Paragraph 11 of the lease (page 221 of the transcript) stipulates:

"Nothing in this lease is to prevent the continued operation of the Greensboro High Point Airport as an accredited C. A. A. public airport."

The record from the Court of Claims filed with your Honorable Court shows on page 8 of the transcript of record the following tabulation, which indicates the use of the airport by aircraft of civilian and military planes:

<i>Date</i>	<i>Airliner</i>	<i>Civilian itinerant</i>	<i>Civilian local</i>	<i>Military</i>	<i>Monthly total</i>
August 1943	242	289	2,584	1,576	4,691
September 1943	226	111	4,082	1,384	5,803
October 1943	256	115	3,647	1,598	5,656
November 1943	238	162	3,336	1,750	5,486
December 1943	232	147	3,892	1,542	5,813
January 1944	200	149	6,220	1,647	8,216
February 1944	184	112	854	1,552	2,702
Total 7 months' period	1,578	1,125	24,615	11,049	38,367

Argument.

This is incorporated in No. 8 of the Special findings of fact made by the Court of Claims (104 Court of Claims Reports 342, 347).

From the above tabulation, it is evident that less than one out of every three flights from the airport were made by aircraft of the United States, yet the Supreme Court did not find that the Greensboro High Point Authority was liable in eminent domain proceedings to the plaintiffs in that case.

Implicit in the opinion is that the airport operator was not liable since it was not the efficient cause of the injury. For this reason it was felt that the opinion of the Pennsylvania Supreme Court clearly focuses possibility of liability on the actual aircraft rather than the owner of the airport from which they emanate.

In addition, it should be pointed out that it was not until the passage of the Federal Tort Claims Act of 1946 Aug. 2, 1946, Ch 753, title IV, 60 Stat 842 28 U.S.C.A. 1346 that the United States became liable in tort. Hence, at the time of the *Causby* case the only possible remedy that the plaintiffs had was a suit under the Tucker Act March 3, 1897, ch 359, 24 Stat 505, raising the constitutional issue of the Fifth Amendment and involving an actual expropriation of property. The plaintiffs in the *Causby* case and in this case are in exactly opposite positions. In the *Causby* case, the remedy in tort was not possible and plaintiffs had a remedy only in eminent domain proceedings. In the present case, the Pennsylvania Supreme Court has indicated there is no remedy in eminent domain proceedings but has explicitly preserved the plaintiffs' right to proceed under State law for torts against the

Argument.

airlines. But in both cases, the position of the airport operator is the same and in both cases the courts have not left the plaintiffs without a remedy. Hence, how can the plaintiff in this case claim that he is deprived of property without due process of law, at least at this juncture?

If the position of the plaintiff be accepted that the County is liable for a taking of property and has exercised its right of eminent domain over property adjoining the airport by reason of its construction of the airport an intolerable and unreasonable burden would be placed upon the County of Allegheny and other municipal and public airport operators and owners.

It must be noted that County of Allegheny not only does not own or operate or control the planes going in and out of the Greater Pittsburgh Airport, as has been pointed out by the Supreme Court of Pennsylvania, but neither does it, nor can it, select the number of planes used by the commercial airlines, the types of planes, whether they are motor-driven or jet powered, whether they are heavy or light, whether they are quiet or noisy, or whether they can navigate the runways at the airport in a more or less horizontal or vertical fashion. These things are all within the control of the commercial airlines to whom the County has leased the facilities at the airport. It is not the County of Allegheny but the Federal government which certifies the type, size, noise characteristics, etc., of the planes that use the County's airport.

All flights of aircraft are governed by the Federal government, and the County of Allegheny has no right

Argument.

to determine or direct the altitude of flights in and out of the Greater Pittsburgh Airport. There has never been any allegation or charge that the Greater Pittsburgh Airport does not meet the legal requirements set up by the Federal Government or that the Airport is not large enough. Plaintiff's property is situate approximately 3100 feet from the end of the northeast runway. Should the Federal Government issue new regulations, as has frequently been done in the past, changing the pattern of flight or the angle of ascent or descent, planes would of necessity have to fly over property much further away from the end of the runway and at lower altitudes than they now fly.

In the usual case of exercising the right of eminent domain, the condemning party, whether a municipality, County or other agency, determines in the first instance what property is to be taken. Estimates of the amount of damages, of necessity, must be made. Even though estimates may vary and judicial determinations may change these estimates, the condemning body has within its power the right to determine what property shall be taken for public purposes. The amount of damages to be paid may subsequently be determined in judicial proceedings, but the damages are *only* for the property which has been appropriated by the public body. Under the contentions of the plaintiff the taking of property would depend *not upon the action of the County* but upon the action of some *other* public body, in this case, the *United States of America*, over whose action the County of Allegheny would have no control. The County may have decided to take 2,000 acres of land for the purpose of constructing an airport and then find, by reason of a change in regulations at some subsequent period, that it

Argument.

has "taken" property miles away from the airport and that such "taking" was effected by the County *without* any official action and without its *knowledge*. No public body, under such circumstances, could undertake the construction of an airport since the cost of owning and operating such an airport would be limitless and beyond the control of the governing body.

V. Where a State Court Has Decided That Certain Acts Do Not Constitute a Taking Under the Laws and Constitution of the State, Such Determination Should Not Be Overruled by the Supreme Court of the United States.

Where a state court has determined that certain acts do not under the laws and constitution of the state constitute a taking, injury or destruction of property, this Court has in the past indicated that it should not be tempted to substitute its opinion for that of the state court: *Marchant v. Pennsylvania Railroad*, 153 U.S. 380 (1894), and *Sauer v. New York*, 206 U.S. 536 (1907). This Court held in the *Marchant* case, at page 385:

"The first proposition asserted by the plaintiff, that her private property has been taken from her without just compensation having first been made or secured, involves certain questions of fact . . . But it was adjudged by the Supreme Court of Pennsylvania that the acts of the defendant which were complained of did not, under the laws and constitution of the State, constitute a taking, an injury, or a destruction of the plaintiff's property.

"We are not authorized to inquire into the grounds and reasons upon which the Supreme Court

Argument.

of Pennsylvania proceeded in its construction of the statutes and constitutions of that State, . . .

"But we are urged to sustain and exercise our jurisdiction in this case because it is said that the plaintiff's property was taken 'without due process of law,' . . .

"It is sufficient for us in the present case to say that, even if the plaintiff could be regarded as having been deprived of (p. 386) her property, the proceedings that so resulted were in 'due process of law.'

"The plaintiff below had the benefit of a full and fair trial in the several courts of her own State, whose jurisdiction was invoked by herself. In those courts her rights were measured, not by laws made to affect her individually, but by general provisions of law applicable to all those in like condition."

In the *Sauer* case, at pp. 547-548 of 206 U. S., this Court pointed out that there was no lack of due process in State court proceedings which determined that the plaintiff's property had not been taken and that "such question must be for the final determination of the state court".

Even if the *Marchant* and *Sauer* cases are considered no longer to be the law, it is to be noted that the present case differs from both the *Marchant* and *Sauer* cases in one important respect. In those cases, the identity of the body which had allegedly condemned the property of plaintiff was clear. In the present case the Supreme Court of Pennsylvania has not decided whether there has been damage to plaintiff's property either tor-

Argument.

tious or otherwise. All that it has decided is that under State law, whether there has been a taking or not the County of Allegheny has no liability under the facts. It is submitted that this is peculiarly a question of State law for the determination of the State court. Surely, this Court does not wish to tell the fifty states that under their State laws and constitutions an airport operator must in all cases be liable in eminent domain proceedings to adjoining property owners regardless of the facts and of the actions of others whom the airport operator cannot control, and thus mandate to those fifty states who shall be liable and that such liability shall be *only* in eminent domain proceedings in the *State* courts.

*Conclusion.***CONCLUSION**

It is clear from the record that the County took no official action that would give rise to a taking of plaintiff's property.

It seems equally clear that the *Causby* case provides no support for plaintiff's contention that there is a taking by the County without official action. Not only was the *Causby* case directed against those who own, operate or control the aircraft involved . . . *not the airport owner* . . . but factually, plaintiff has not presented a case which falls within the *Causby* principle.

Plaintiff's argument that the remedy provided by the Pennsylvania Supreme Court is illusory is without foundation, in view of the fact that there is open to the plaintiff, not only the tort actions adverted to by the Pennsylvania Supreme Court, but actions available to the plaintiff under the regulations of the Federal Aviation Agency. In addition, there is presently pending an equity suit by plaintiff.

For the above reasons, as well as others set forth in the preceding argument, it seems apparent that this case does not present any Federal constitutional issue.

Therefore, it is respectfully submitted that the decision of the Pennsylvania Supreme Court be affirmed.

MAURICE LOUIK
County Solicitor

FRANCIS A. BARRY
First Asst. County Solicitor

PHILIP BASKIN
Special Counsel

APPENDIX

Grant Agreement

Date of Offer: June 7, 1948

Greater Pittsburgh Airport

Project No. 9-36-029-801

**To: The County of Allegheny, Pennsylvania
(herein referred to as the "Sponsor")**

**FROM: The United States of America (acting through
the Administration of Civil Aeronautics, herein referred to as the (Administrator))**

WHEREAS, The Sponsor has submitted the Administrator a Project Application dated February 27, 1948, for a grant of Federal funds for a project for the Greater Pittsburgh Airport (herein called the "Airport") and a Sponsor's Assurance Agreement adopted by the Sponsor under date of January 13, 1948, relating to the operation and maintenance of said Airport, together with plans and specifications for such project, which Project Application and Sponsor's Assurance Agreement are hereby specifically incorporated herein and made a part hereof; and

WHEREAS, The Administrator has approved a project for development of the Airport (herein called the "Project") consisting of the following described airport development:

Grading, drainage and paving of taxiways "S" and "T" and of plaza entrance to terminal building; fine grading and paving of loading apron area adjacent to south dock of terminal building; water connection to terminal building and water lines for fire control

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in loading apron area; electrical underground conduits and gasoline lines under entrance plaza; power house including general contract, electrical and mechanical contracts, excluding boilers but including boiler auxiliaries and underground concrete oil storage bunkers; gasoline lines and service drive to power house;

all as more particularly described in the plans and specifications approved by the Administrator or his duly designated representative, which plans and specifications are incorporated herein and made a part hereof;

NOW, THEREFORE, pursuant to and for the purpose of carrying out the provisions of the Federal Airport Act (60 Stat. 180; Pub. Law 377, 79th Congress), and in consideration of (a) the Sponsor's adoption and ratification of the representations and assurances contained in said Project Application and Sponsor's Assurance Agreement, and its acceptance of this offer, as hereinafter provided, and (b) the benefits to accrue to the United States and the public from the accomplishment of the Project and the operation and maintenance of the Airport, as herein provided,

THE ADMINISTRATOR, FOR AND ON BEHALF OF THE UNITED STATES, HEREBY OFFERS AND AGREES to pay, as the United States' share of costs incurred in accomplishing the Project, 50 percentum of all allowable project costs, subject to the following terms and conditions:

1. The maximum obligation of the United States payable under this Offer shall be \$650,000.00.
2. The Sponsor shall:

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- (a) begin accomplishment of the Project within a reasonable time after acceptance of this Offer, and
 - (b) carry out and complete the Project in accordance with the terms of this Offer and the Federal Airport Act and the Regulations promulgated thereunder by the Administrator in effect on the date of this Offer, which Act and Regulations are incorporated herein and made a part hereof, and
 - (c) carry out and complete the Project in accordance with the plans and specifications incorporated herein as they may be revised or modified with the approval of the Administrator or his duly authorized representative.
3. The Sponsor shall operate and maintain the Airport as provided in the Sponsor's Assurance Agreement incorporated herein.
 4. Any misrepresentation or omission of a material fact by the Sponsor concerning the Project or the Sponsor's authority or ability to carry out the obligation assumed by the Sponsor in accepting this Offer shall terminate the obligations of the United States, and it is understood and agreed by the Sponsor in accepting this Offer that if a material fact has been misrepresented or omitted by the Sponsor, the Administrator on behalf of the United States may recover all grant payments made.
 5. The Administrator reserves the right to amend to withdraw this Offer at any time prior to its acceptance by the Sponsor.

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This Offer shall expire and the United States shall not be obligated to pay any of the allowable costs of the Project unless this Offer has been accepted by the Sponsor within 60 days from the above date of Offer or such longer time as may be prescribed by the Administrator in writing.

(a) It is hereby understood and agreed that the Sponsor will not advertise for bids, award any contract or commence any construction work in connection with the project and that the United States will not make, nor be obligated to make, any payment under this Grant Agreement, until final plans and specifications have been submitted to and approved by the Administrator.

(b) It is understood and agreed by the parties hereto that the United States will not make, nor be obligated to make, any payment under this Grant Agreement until an Agency Agreement, entered into between the Pennsylvania Aeronautics Commission and the County of Allegheny, Pennsylvania, pursuant to the provisions of Act No. 53 of the Pennsylvania Laws, 1947, has been submitted to and approved by the Administrator as being consistent with the terms and conditions of this Grant Agreement. It is further understood and agreed that such Agency Agreement, as approved by the Administrator, will not be amended, modified or terminated without the prior written approval of the Administrator or his duly designated representative.

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The Sponsor's acceptance of this Offer and ratification and adoption of the Project Application and Sponsor's Assurance Agreement incorporated herein shall be evidenced by execution of this instrument by the Sponsor as hereinafter provided, and said Offer and acceptance shall comprise a Grant Agreement, as provided by the Federal Airport Act, constituting the obligations and rights of the United States and the Sponsor with respect to the accomplishment of the Project and the operation and maintenance of the Airport. Such Grant Agreement shall become effective upon the Sponsor's acceptance of this Offer and shall remain in full force and effect throughout the useful life of the facilities developed under the Project but in any event not to exceed twenty years from the date of said acceptance.

UNITED STATES OF AMERICA

THE ADMINISTRATOR OF CIVIL AERONAUTICS

By /s/ ORA S. YOUNG

Regional Administrator, Region I

Amendment to Grant Agreement.**Amendment to Grant Agreement****Greater Pittsburgh Airport****Allegheny County, Pennsylvania****Project No. 9-36-029-801**

WHEREAS, the Administrator of Civil Aeronautics has determined that, in the interest of the United States, the Grant agreement between the Administrator of Civil Aeronautics, acting for and on behalf of the United States, and the County of Allegheny, Pennsylvania, accepted by said County of Allegheny on the 22nd of June, 1948, should be amended as hereinafter provided:

NOW, THEREFORE, WITNESSETH:

That, in consideration of the benefits to accrue to the parties hereto, the Administrator of Civil Aeronautics, on behalf of the United States, on the one part, and the County of Allegheny, Pennsylvania, on the other part, do hereby mutually agree that the Grant Agreement accepted by the Sponsor under date of June 22, 1948, be and the same is hereby amended by adding thereto as paragraph 8 of the following provisions:

- 8. (a) It is hereby understood and agreed that the Sponsor's Assurance Agreement incorporated in and constituting part of this Grant Agreement is hereby amended by deleting subsections (b) through (c) of Section 1 thereof, and inserting in lieu thereof the following:**

"(b) These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal-aid for the Project or any portion thereof,

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made by the Administrator, and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and effect throughout the useful life of the facilities developed under the Project but in any event not to exceed twenty years from the date of said acceptance of an offer of Federal aid for the Project.

- (c) The Sponsor will operate the Airport as such for the use and benefit of the public. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will keep the Airport open to all types, kinds and classes of aeronautical use without discrimination between such types, kinds and classes: Provided, That the Sponsor may establish such fair, equal and non-discriminatory conditions to be met by all users of the Airport as may be necessary for the safe and efficient operation of the Airport: And provided further, That the Sponsor may prohibit any given type, kind or class of aeronautical needs of the area served by the Airport.
- (d) The Sponsor will not exercise, grant or permit any exclusive right for the use of the Airport forbidden by section 303 of the Civil Aeronautics Act of 1938, as amended. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will not either directly or indirectly exercise, or grant to any person, firm or corporation, or permit any person, firm, or

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corporation to exercise, any exclusive right for the use of the Airport for commercial flight operations, including air carrier transportation, rental of aircraft, conduct of charter flights, operation of flight schools or the carrying on of any other service or operation requiring the use of aircraft.

- (c) The Sponsor agrees that it will operate the Airport for the use and benefit of the public, on fair and reasonable terms and without unjust discrimination. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically covenants and agrees:

(1) That in any agreement, contract, lease or other arrangement under which a right or privilege at the Airport is granted to any person, firm, or corporation to render any service or furnish any parts, materials, or supplies (including the sale thereof) essential to the operation of aircraft at the Airport, the Sponsor will insert and enforce provisions requiring the contractor:

(a) To furnish good, prompt and efficient service adequate to meet all the demands for its service at the Airport,

(b) To furnish said service on a fair, equal and non-discriminatory basis to all users thereof, and

(c) To charge fair, reasonable and non-discriminatory prices for each unit of

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sale or service: Provided, That the contractor may be allowed to make reasonable and non-discriminatory discounts, rebates or other similar types of price reductions to volume purchasers.

- (2) That it will not exercise or grant any right or privilege which would operate to prevent any person, firm, or corporation operating aircraft on the Airport from:
- (a) Performing any service on its own aircraft with its own employees (including, but not limited to maintenance and repair) that it may choose to perform,
 - (b) Purchasing off the Airport and having delivered on the Airport without entrance fee, delivery fee or other surcharge for delivery any parts, materials or supplies necessary for the servicing, repair or operation of its aircraft: Provided, That the Sponsor may make reasonable charges for the cost of any service (including charges for maintenance, operation and depreciation of facilities and rights-of-way) furnished by the Sponsor in connection with the delivery of any parts, materials or supplies: And provided further, That in case of aviation gasoline and oil purchased off the Airport and delivered to the Airport, the Spon-

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sor may require the aviation gasoline and oil to be stored in specified places, limiting the amount delivered to the amount of storage space available, and if necessary for the safe and efficient operation of the Airport, require persons furnishing their own aviation gasoline and oil to utilize such storage, dispensing and delivery system as the Sponsor may designate.

- (3) That if it exercises any of the rights or privileges set forth in subsection (1) of this paragraph it will be bound by and adhere to the conditions specified for contractors set forth in said subsection (1).
- (f) Nothing contained herein shall be construed to prohibit the granting or exercise of an exclusive right for the furnishing of non-aviation products and supplies or any service of a non-aeronautical nature.
- (g) The Sponsor will suitably operate and maintain the Airport and all facilities thereon or connected therewith which are necessary for airport purposes other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for aeronautical purposes: Provided, That nothing contained herein shall be construed to require that the Airport be operated and maintained for aeronautical uses during temporary periods when snow, flood, or other climatic conditions interfere substantially

Amendment to Grant Agreement.

with such operation and maintenance. Essential facilities, including night lighting systems, when installed, will be operated in such a manner as to assure their availability to all users of the Airport.

- (h) To the extent of its financial ability, the Sponsor will replace and repair all buildings, structures, and facilities developed under the Project which are destroyed or damaged, replacing or restoring them to a condition comparable to that preceding the destruction or damage, if such buildings, structures, and facilities are determined by the Administrator to be necessary for the normal operation of the Airport.
- (i) Insofar as is within its powers and reasonably possible, the Sponsor will prevent the use of any land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, taking-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either by the adoption and enforcement of a zoning ordinance and regulations or by the acquisition of easements or other interests in lands or airspace, or by both such methods. With respect to land outside the boundaries of the airport, the Sponsor will also remove or cause to be removed any growth, structure, or other object thereon which would be a hazard to the landing,

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taking-off, or maneuvering of aircraft at the Airport, or if such removal is not feasible, will mark or light such growth, structure, or other object as an airport obstruction or cause it to be so marked or lighted. The airport approach standards to be followed in performing the covenants contained in this paragraph shall be those established by the Administrator in Office of Airports Drawing No. 672 dated September 1, 1946, unless otherwise authorized by the Administrator.

- (j) All facilities of the Airp developed with Federal aid and all those usable for the landing and taking-off of aircraft will be available to the United States at all times, without charge, for use by military and naval aircraft in common with other aircraft, except that if the use by military and naval aircraft is substantial, a reasonable share, proportional to such use, of the cost of operating and maintaining facilities so used, may be charged. The amount of use to be considered "substantial" and the charges to be made therefor shall be determined by the Sponsor and the using agency.
- (k) The Sponsor will furnish to any civil agency of the United States, without charge (except for light, heat, janitor service, and similar facilities and services at the reasonable cost thereof), such space in airport buildings as may be reasonably adequate for use in connection with any airport air traffic control activities, weather-reporting activities, and communications activi-

Amendment to Grant Agreement.

ties related to airport air traffic control, which are necessary to the safe and efficient operation of the Airport and which such agency may deem it necessary to establish and maintain at the Airport for such purpose.

- (l) After completion of the Project and during the term of these covenants, the Sponsor will maintain a current system of Airport accounts and records, using a system of its own choice, sufficient to provide annual statements of income and expense. It will furnish the Administrator with such annual or special Airport financial and operational reports as he may reasonably request. Such reports may be submitted to the Administrator on forms furnished by him, or may be submitted in such other manner as the Sponsor elects, provided the essential data are furnished. The Airport and all airport records and documents affecting the Airport, including deeds, leases, operation and use agreements, regulations, and other instruments, will be available for inspection by any duly authorized representative of the Administrator upon reasonable request. The Sponsor will furnish to the Administrator, upon request a true copy of any such document.
- (m) The Sponsor will not enter into any transaction which would operate to deprive it of any of the rights and powers necessary to perform any or all of the covenants made herein, unless by such transaction the obligation to perform all such covenants is assumed by another public agency

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eligible under the Act and the regulations to assume such obligations and having the power, authority and financial resources to carry out all such obligations. If an arrangement is made for management or operation of the Airport by any agency or person other than the Sponsor or an employee of the Sponsor, the Sponsor will reserve sufficient powers and authority to insure that the Airport will be operated and maintained in accordance with the Act, the Regulations, and these covenants.

- (n) The Sponsor will maintain a master plan (layout) of the Airport having the current approval of the Administrator. Such plan shall show building areas, approach areas, and landing areas, indicating present and future proposed development. The Sponsor will conform to such master plan (layout) in making any future improvements or changes at the Airport which, if made contrary to the master plan (layout), might adversely affect the safety, utility, or efficiency of the Airport."

and by renumbering subsection (p) of said Section 1, subsection (o).

Amendment to Grant Agreement.

IN WITNESS WHEREOF, the parties hereto have hereby caused this amendment to said Grant Agreement to be duly executed as of the 21st day of September, 1948.

UNITED STATES OF AMERICA
Administrator of Civil
Aeronautics

BY ORA W. YOUNG
Regional Administrator,
Region I
ALLEGHENY COUNTY,
PENNSYLVANIA

BY JOHN J. KANE
Title [SEAL]
Chairman Board of
County Commissioners

Attest: M. N. SNYDER
Title: Chief Clerk

CERTIFICATE OF SPONSOR'S ATTORNEY

I, NATHANIEL K. BECK, acting as Attorney for the County of Allegheny, Pennsylvania, do hereby certify:

That I have examined the foregoing Amendment to Grant Agreement and the proceedings taken by said County of Allegheny, Pennsylvania, relating thereto, and find that the execution thereof is in all respects due and proper and in accordance with the laws of the State of Pennsylvania, and further that, in my opinion, said Amendment to Grant Agreement constitutes a legal and binding obligation of the County of Allegheny, Pennsylvania, in accordance with the terms thereof. Dated at Pittsburgh, Pa., this 25th day of September, 1948.

NATHANIEL K. BECK
Title: County Solicitor

*Air Traffic Rules.***Air Traffic Rules—Minimum Safe Altitudes of Flight****UNITED STATES OF AMERICA****CIVIL AERONAUTICS BOARD****Washington, D. C.****Civil Air Regulations, Part 60****Interpretation No. 1****Adopted: July 22, 1954**

In the Civil Policy Report of the Air Co-ordinating Committee, released by the President under date of May 26, 1954, the following policy statement appears:

"Existing federal regulations relating to minimum altitudes of flight should be re-examined by the appropriate agencies to determine whether revision of such regulations is necessary or desirable in order to dispel any possible inference that the federal government has not exercised its regulatory jurisdiction over the entire flight of an aircraft in the airspace above the United States navigable in fact."

The textual material that accompanies this policy statement indicates that the re-examination called for is desirable because of doubts which have been expressed as to whether current minimum safe altitude regulations of the Board specifically apply to aircraft while landing or taking off. Directly involved is the question whether the airspace which lies at and above the flight path of aircraft making normal take-offs and landings comes within the term "navigable airspace" as defined in the Civil Aeronautics Act. If it does a public right of freedom of transit is recognized and proclaimed to exist for citizens of the United States by section 3 of that Act.

Air Traffic Rules.

The current minimum safe altitudes for flight, so far as here pertinent, are set forth in §60.17 of the Civil Air Regulations, and read as follows:

"§60.17. *Minimum safe altitudes.* Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes:

"(a) *Anywhere.* An altitude which will permit, in the event of the failure of a power unit, an emergency landing without undue hazard to persons or property on the surface;

"(b) *Over congested areas.* Over the congested areas of cities, towns or settlements, or over an open-air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet from the aircraft. Helicopters may be flown at less than the minimum prescribed herein if such operations are conducted without hazard to persons or property on the surface and in accordance with paragraph (a) of this section; however, the Administrator, in the interest of safety, may prescribe specific routes and altitudes for such operations, in which even helicopters shall conform thereto;

"(c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle, or structure. Helicopters may be flown at less than the minimums prescribed herein if such operations are conducted without hazard to persons or property on the sur-

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face and in accordance with paragraph (a) of this section."

The particular part of the regulations to which this interpretation relates is that contained in the initial clause of the section: "Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes". Is this to be read as establishing a rule prescribing a changing but continuously effective minimum altitude for each instant of the climb after take-off and approach to landing; or is it simply an exception to the general minimum altitude rule, relieving the pilot of the obligation of complying therewith on his way up to and down from the higher reaches?

In accordance with the recommendation of the Air Coordinating Committee, the Board has reviewed these minimum safe altitude regulations, taking into consideration past regulations on the subject, the legislative intent of the Congress, the powers and duties of the Board in this field, and the technical aspects of aircraft operation. In arriving at its conclusion that the revision of this aspect of its minimum altitude rules is neither necessary nor desirable, the Board does so because in its opinion the application of the rule as herein interpreted is productive of optimum safety in landing and take-off operations. This was so at the time the rule was promulgated. It remains so now.

In arriving at its interpretation of the current regulation the Board considers that the following factors are the ones which should be taken primarily into account:

(a) The legislative history of the Air Commerce Act of 1926 shows that the Congress intended the navi-

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gable airspace to extend down to the surface at airports. The regulation should therefore be interpreted so as to give effect to this expression of Congressional intent, if such an interpretation is possible.

(b) The duty of the Board under the Act is primarily to prescribe safe altitudes of flight, not to proclaim what is navigable airspace. Although navigable airspace has been defined by the Congress in terms of minimum altitudes, these must be fixed by the Board solely on the basis of safety.

(c) The matter of safety of flight in terms of safe altitudes is dependent upon many variables including the type of aircraft flown, the weather conditions at the time, and the terrain below. An altitude which may be wholly safe and desirable for cruising flight at one time for one aircraft may be wholly unsafe for it under different conditions, or for other aircraft under the same conditions. For these reasons, minimum safe altitudes for flight cannot be described with the geometrical particularity of a conveyance. As a consequence the overriding minimum safe altitude rule is phrased in terms of performance of the particular aircraft related to the terrain below—or that “altitude which will permit, in the event of the failure of a power unit, an emergency landing without undue hazard to persons or property on the surface”.

(d) Landing and take-off operations require special treatment. This need arises by reason of the slanting nature of the flight path. However, as in the case of the en route rules, maximum safety may be achieved only by relating the requirement to the particular performance capabilities of the aircraft under existing conditions. It is true that, in the case of some airports, full compliance

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with the en route minimum altitude rules is possible even during landing or take-off; in many others, however, particularly in the case of those airports close to urban centers, compliance with the en route rules is not possible, and the Board's safety concern therefore lies in getting aircraft on and off such airports and up to and down from cruising altitude with the greatest degree of safety. Because of individual variations in aircraft performance, this goal of maximum safety cannot be achieved by a metes and bounds description of airspace surrounding airports applicable to all aircraft alike, or by a uniform formula prescribing a given angle of climb and descent. Any such fixed requirement might be appropriate to the performance capabilities of some aircraft, unduly lax with respect to others, and impossible of achievement by others. Either a meaningless average would have to be struck, or a minimum requirement fixed which could be met at all times by every aircraft possessing an airworthiness certificate. In either case the Board would not be fulfilling its obligation under the Act to provide safe altitudes of flight. To achieve the proper high level of safety, it is vital that every pilot, consistently with sound and conservative operating practices, take full advantage of the performance capabilities of his aircraft so as to spend as little time as possible at altitudes below the minimums established for cruising flight. The "when necessary" language used in current §60.17 achieves this result simply and directly. It prohibits low altitude flying except when a departure from the otherwise applicable minimum is necessary for landing or taking off. It prohibits unnecessary low flying during the execution of those maneuvers. At every point along the proper flight path for approach to landing or climb after take-

off, an unnecessary dip would place the pilot in potential violation of this regulation. In effect, it requires the pilot to do the best he can consistently with sound flying practice and the machine at his disposal to avoid unduly prolonged low flight.

(e) Possibly other formulae could be devised which express the same standard of safety in specific terms of minimum altitudes linked to the normal and necessary downward or upward flight path of the particular airplane under the particular conditions. In this connection it makes no difference whether the prescribed minimum flight path is described directly by reference to the ground below or whether it is fixed in relation to the minimum en route altitudes which themselves have been ascertained by reference to the surface. In adopting this second solution, §60.17 fixes the flight path in terms of permissible deviation from the otherwise applicable norm. It applies the standard of necessity to accomplish specified ends and in so doing produces the maximum flight paths for climb and descent that are consistent with the safest operating techniques and practices. However worded, no other formula could do more or do it better.

In consideration of the foregoing, the Board construes the words "Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes" where such words appear in §60.17 of the Civil Air Regulations, as establishing a minimum altitude rule of specific applicability to aircraft taking off and landing. It is a rule based on the standard of necessity, and applies during every instant that the airplane climbs after take-off and throughout its approach

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to land. Since this provision does prescribe a series of minimum altitudes within the meaning of the Act, it follows, through the application of section 3, that an aircraft pursuing a normal and necessary flight path in climb after take-off or in approaching to land is operating in the navigable airspace.

(Sec. 205 (a); 52 Stat. 984; 49 U.S.C. 425 (a). Interpret or apply 401 (a); 52 Stat. 1007; 49 U.S.C. 551a)).

By the Civil Aeronautics Board:

/s/ M. C. Mulligan
Secretary

(SEAL)

Part 60 last printed August 1, 1949)
